IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 16.03.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.616 of 2003

1. H.Murali
2. H.Moorthy
3. Murugan ... Appellants/Plaintiffs.

Vs.

1. A.R.Seyad Mariam
2. A.Mohamed Aysha
3. A.Nafeesa

... Respondents/Defendants.

PRAYER: Second Appeal filed under Section 100 CPC against the Judgment and decree of the learned VII Additional Judge, City Civil Court, Madras made in A.S.No.33 of 2000 dated 30.09.2002 preferred against the judgement and decree of the learned II Assistant Judge, City Civil Court, Madras in O.S.No.7794 of 1991 dated 22.1.1999.

For Appellants : Mr.R.S.Ramanathan
For Respondents : Mr.M.I.Meerasahib

J U D G M E N T

The plaintiffs 2 to 4 are the appellants, who have filed the suit for declaration that the defendants 1 to 3 have only life interest in the suit property bearing Door No.78 Old No.158, Coral Merchant Street, Muthialpet, Madras, and thereafter, it shall vest with the plaintiffs absolutely and for a consequential permanent injunction and the second appeal is filed by them having failed in both the Courts below. Pending the first appeal it is true that the said plaintiffs have filed in I.A.No.874 of 2000 for receipt of deed of revocation of settlement dated 21.05.1969 marked as Ex.A.5 in the appellate stage, the appellate court dismissed the application on the basis that the said document is not maintainable in law.

2. One of the main contentions raised by the learned counsel for the appellants / plaintiffs is as to the correctness of the dismissal of I.A.No.874 of 2000 filed by the plaintiffs / appellants before the First Appellate court for receipt of additional evidence, while disposing of the

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appeal with reference to Order 41 Rule 27 C.P.C. The additional document sought to be filed is stated to be a deed of revocation of settlement dated 21.05.1969 by which one Girija Bai Ammal, who has as earlier executed a settlement deed dated 15.07.1964 marked as Ex.A.1 stated to have cancelled the said Ex.A.1. It is true that the Trial Court while dealing with that aspect has stated that the said revocation deed dated 21.05.1969 was not produced but nevertheless has held even at the time of rendering the judgement that the said Girija Bai Ammal is not legally entitled to execute such revocation deed dated 21.05.1969 since her earlier settlement deed dated 15.07.1964 marked Ex.A.1 cannot be revoked.

3. In fact the learned first appellate judge has also held that such revocation deed is not valid in law, even though he has allowed the said revocation deed executed by Girija Bai Ammal dated 21.05.1969 to be marked as Ex.A.5 in the first appellate stage but rejected the application for receiving the additional evidence. The contention of the learned counsel for the appellant in this regard is that under Order 41 Rule 27 of the C.P.C., when the appellate court allows the said document to be produced as additional evidence by marking as it Ex.A.5, it is incumbent on the part of the first appellate court to take evidence by itself or direct the court which has passed decree against which the appeal is preferred or any other subordinate court send to the appellate court thereafter and then decide the issue.

4. In this regard, it is relevant to extract the said provisions relied upon by the learned counsel for the appellants, namely, Order 41 Rule 27 and 28 of C.P.C.

> "27. Production of additional evidence in Appellate Court.-
> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
>
> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
>
> (b) the Appellate Court requires and document to be produced or any witness to be examined to enable it to pronounce judgement, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
>
> (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

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28. Mode of taking additional evidence.-

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

5. The learned counsel appearing for the appellant also would rely upon the judgement of the Hon'ble Apex Court rendered in Sanjiv Goel Vs. Avtar S.Sandhu reported in 2006(9) SCC 748 to contend that when such application for additional evidence was pending, without disposing of the same, the appeal was disposed by dismissing the same and the same is against Order 41 Rule 27 and 28 of C.P.C. That was the case wherein an application under Order 41 Rule 27 remained not disposed while the first appellate court has dismissed the appeal even before that. The Hon'ble Apex court has set aside the orders of the first appellate court as well as the High Court and remanded the matter back to the District Judge to decide the appeal as well as the application filed under Order 41 Rule 27 C.P.C., in the following operative portion:

"2. In the present appeal, at the outset, the learned counsel for the appellant brought to our notice the fact that an application under Order 41 Rule 27 CPC filed by the appellant before the learned Additional District Judge has remained pending throughout as no orders were passed on the said application by the learned Additional District Judge or by the High Court. The learned counsel appearing for the respondent is unable to dispute this fact that the said application has not been disposed of so far. Without expressing any opinion on the merits of the claim of the appellant in his application under Order 41 Rule 27 CPC we are of the view that the said application ought to have been disposed of by the learned Additional District Judge before deciding the appeal which was pending before him. Non-disposal of the said application has led to the miscarriage of justice. Accordingly, we set aside the judgement of the High Court as well as the judgement dated 22.07.1997 of the Additional District Judge Jalandhar and remand the matter back to the District Judge, Jalandhar for assigning the case to an appropriate court for decision of the appeal as well as the application of the appellant under Order 41 Rule 27 CPC on merits in accordance with law. This appeal is disposed of accordingly. The parties to bear their own costs."

6. In these circumstances, this contention is not tenable and the judgement relied upon by the learned counsel for the appellant is not applicable to the facts and circumstances of the case. A reference to the judgements of the Trial Court as well as the First Appellate Court show that the Trial Court even though has stated that the said revocation deed

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dated 21.05.1969 was not produced before it nevertheless held that Girija Bai Ammal has no right to execute such revocation deed having already executed a settlement deed on 15.07.1964 marked as Ex.A.1. Further, this view has been affirmed by the learned First Appellate Judge also. In addition to that as it is seen in the judgement of the learned First Appellate Judge, in fact the application filed by the appellants under Order 41 Rule 27 has been rejected on the basis that the Girija Bai Ammal has no right to execute the said revocation deed at all. Therefore, the contentions raised on behalf of the learned counsel for the appellants by placing reliance on Order 41 Rule 27 and 28 cannot be sustained.

7. While admitting the second appeal the following substantial question of law were framed by this Court:

> "This Second Appeal is admitted on the following substantial questions of law:
>
> i. Whether the first Appellate Court is right in dismissing the I.A.No.874 of 2000 filed by the appellants to receive the additional evidence?
>
> ii. Whether the Courts below are right in holding that under the deed dated 12.03.1951 the Settler settled his half share in favour of his wife Girija Ammal and her two sons?
>
> iii. Whether the Courts Below are right in holding that under deed dated 15.07.1964, the appellants are given vested remainder in respect of the 1/6th share only?"

8. Coming to the merit of the case, it is the case of the plaintiffs 2 to 4 who are admittedly the sons of the 5th defendant, namely, C.Harinath that originally the suit property belonged to Duraisamy Naidu and his wife Girija Bai Ammal who are entitled to 1/2 share each. It is also not in dispute that Duraisamy Naidu who was entitled for 1/2 share, has settled his 1/2 share under a deed of settlement executed by him dated 12.03.1951 conveying his 1/2 share equally to his sons, namely, defendants 4 and 5 C.Surendranath and C.Harinath apart from his wife Girija Bai Ammal and subsequently the said Duraisamy Naidu also died. The plaintiffs 2 to 4 based their claim under the deed of settlement executed by Girija Bai Ammal dated 15.07.1964 marked as Ex.A.1 under which Girija Bai Ammal who was entitled for 1/2 share to the suit property by virtue of purchase made in the year 1941 along with her husband Duraisamy Naidu has given her 1/2 share in favour of one of her sons the 4th defendant C.Surendranath to be enjoyed by him during his life time and after his life time to his children absolutely who were originally arrayed as plaintiffs 1 and 5 namely, S.Manjunath and S.Sylaja and were subsequently, transposed as defendants 8 and 9.

9. Therefore, the 4th defendant who was already given absolute ownership in respect of 1/6 th of the property by the father Duraisamy Naidu under the settlement deed executed on 12.03.1951 was entitled to enjoy the life interest in respect of the 1/2 share of the property of his

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mother Girija Bai Ammal and after his life time to be inherited by the children the 8th and 9th defendants. The plaintiffs 2 to 4 who are the children of the 5th defendant in the suit C.Harinath who was given absolute right by his father in respect of his 1/6th share under the settlement deed dated 12.03.1951 would also be entitled to 1/6 th of his mother's share, namely, Girija Bai Ammal acquired from Duraisamy Naidu under the settlement deed dated 12.03.1951 for life time and thereafter to his children the plaintiffs 2 to 4. It is on that basis both the courts below have come to the conclusion that the plaintiffs 2 to 4 would be entitled to the vested reminder in respect of the 1/6th share of Girija Bai Ammal under the settlement deed dated 15.07.1964 and marked as Ex.A.1 after the life time of their father C.Harinath the 5th defendant an order of permanent injunction was also restricted to that share.

10. In view of the above said factual position as found by both the courts below that the plaintiffs 2 to 4 are entitled for the vested remainder to the extent of 1/6th share, I do not think that there is any question of law much less substantial question of law is involved in this case.

11. In view of the same the second appeal is dismissed with cost and the judgement and decree of the courts below are confirmed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To
1. The VII Additional Judge,
City City Court, Chennai.

2. The II Assistant Judge,
City Civil Court, Chennai.

3. The Section Officer, VR Section,
High Court, Madras.
+ 2 CCs to M/s.M.I.Meerasahib, Advocate SR NO 16472
+ 1 CC To Mr. R.S.Ramanathan, Advocate SR NO.16649

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